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No. 02-954

IN THE SUPREME COURT OF THE UNITED STATES

OFFICE OF INDEPENDENT COUNSEL,
Petitioner,

v.

ALLAN J. FAVISH, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF RESPONDENTS SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY IN SUPPORT OF PETITIONER

James Hamilton
Counsel of Record
Robert V. Zener
Swidler Berlin Shereff Friedman, LLP
Suite 300
3000 K Street, NW
Washington, DC 20007
(202) 424-7500
Counsel for Respondents Sheila Foster Anthony and Lisa Foster Moody

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REPLY BRIEF OF RESPONDENTS SHEILA FOSTER ANTHONY AND LISA FOSTER MOODY IN SUPPORT OF PETITIONER

In applying FOIA Exemption 7(C) to determine whether disclosure of the photographs at issue "could reasonably be expected to constitute an unwarranted invasion of personal privacy", this Court must engage in a balancing process. Whatever public interest there is in knowing what the government is up to must be balanced against the privacy interests involved. The requester has the burden of "identify[ing] with reasonable specificity the public interest that would be served by release."[1] Only disclosure that would "contribute significantly to public understanding of the operations or activities of government" is in the public interest.[2]

The Foster family has powerful privacy interests in defeating Respondent Favish's macabre, disquieting request for the ten photographs of Vince Foster's body taken shortly after his suicide. The family seeks to avoid seeing images of Mr. Foster's body on television or in supermarket tabloids. It wants to be free of the oppressive knowledge that the photographs are on the Internet and available worldwide to millions of people in virtual perpetuity. It desires to forestall the noxious intrusions by the media and others that inevitably will follow disclosure of the photographs.

There is, on the other hand, no legitimate public interest in disclosure. Public curiosity about a tragic death does not equate to the public interest. Where uncovering of

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1 *Hale v. U.S. Dep't of Justice*, 973 F.2d 894, 900 (10th Cir. 1992), *vacated on other grounds*, 509 U.S. 918 (1993).

2 *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 775 (1989) (emphasis added).

wrongdoing is, as here, the public interest asserted, the requester must present more than just allegations of misconduct. Rather, he or she must set forth compelling, or at least persuasive, evidence of such wrongdoing. *Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d 120, 124 (D.C. Cir. 1999). This Favish has not done. Nothing he has said to challenge the conclusion that Mr. Foster committed suicide in Fort Marcy Park in Northern Virginia demonstrates official misconduct. The need for more persuasive evidence is particularly evident where five separate investigations -- two by Independent Counsel -- have reached this conclusion, and a wealth of supporting documents already has been released. *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1179-80 (9th Cir. 2000), *cert. granted*, 123 S.Ct. 1928 (2003), Pet. App. 26a-29a (Pregerson, J., dissenting).[3] Nor can Favish show any nexus between the four photographs the Court of Appeals ordered released and the public interest, because those photographs reveal nothing relevant to his misguided hypothesis that the wound Mr. Foster suffered is inconsistent with suicide. JA 45a-46a.[4] Moreover, the court

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[3] *U.S. Dep't of State v. Ray*, 502 U.S. 164, 178 (1991) (public interest in identity of Haitian refugees interviewed by State Department was "adequately served" by release of redacted interview summaries); *Halloran v. U.S. Veterans Admin.*, 874 F.2d 315, 324 & n.13 (5th Cir. 1989) (public interest in VA investigation "has already been substantially served" by release of redacted transcripts and the VA report); *Marzen v. U.S. Dep't of Health & Human Serv.*, 825 F.2d 1148, 1153-54 (7th Cir. 1987) (public release of intimate details of disabled infant's death "would not appreciably serve the ethical debate" because most of the factual material, "including the final HHS report," was already public); *Miller v. Bell*, 661 F.2d 623, 630-31 (7th Cir. 1981) (documents already released "should be sufficient to permit the plaintiff to evaluate the thoroughness of the investigation"); *Bast v. U.S. Dep't of Justice*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) (public interests "have been served to a large extent by the substantial release of information already made in this case").

[4] *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (public interest must be shown "with respect to the

of appeals' ruling, the district court opinion and the Vaughn index indicate that the other six photographs are so gruesome that a grave, unconscionable invasion of family privacy would result even under the Ninth Circuit's flawed analysis. Pet. App. 3a, 44a-46a.

In *Reporters Committee*, this Court cautioned against a "cramped notion of [the] personal privacy" that Exemption 7(C) protects. 489 U.S. at 763. Recognizing Congress' intent to provide meaningful privacy protection to investigative records, *Reporters Committee* and other decisions have protected a broad range of government records where public release might cause annoyance or embarrassment. *U.S. Dep't of Defense v. F.L.R.A.*, 510 U.S. 487 (1994) (names and addresses of federal employees); *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 600 (1982) ("place of birth, date of birth, date of marriage, employment history, and comparable data"). The public release Favish seeks would do much more than cause the Foster family mere annoyance or embarrassment. To that family -- or to any surviving family -- the public circulation, in the media or on the Internet, of photographs of their loved one's dead body would be a deep and personal indignity. It is inconceivable that Congress intended to allow such a wrenching invasion of personal privacy.

Favish's unsupported assertions of wrongdoing or gross errors in the numerous investigations of Mr. Foster's death are insufficient to override the Foster family's significant privacy interest. Indeed, given recent history, the suggestion that Independent Counsel Starr somehow

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specific information being withheld"); *Kimberlin v. U.S. Dep't of Treasury*, 774 F.2d 204, 208 (7th Cir. 1985) (FOIA requester must show that "benefit would accrue to the public from the disclosure of this document"); *Bast v. U.S. Dep't of Justice*, 665 F.2d at 1255 ("incremental advantage to the public" must be weighed against invasion of personal privacy).

conspired with Clinton Administration officials to conceal wrongdoing by persons in that Administration is too fatuous and bizarre to warrant a response. If allegations of this kind were sufficient to override a privacy interest in law enforcement documents, then no meaning would be left in the privacy protection afforded by Exemption 7(C).

I. The Foster Family Has A Personal Privacy Interest In Non-Disclosure Of The Photographs

1. Favish and some amici argue that, under both FOIA and the common law, the right of privacy is personal and does not survive death. Accordingly, they argue, invasion of a deceased person's privacy cannot be asserted by that person's surviving family. Favish Brief at 3-18; Silha Center Brief at 5-9, Ass'n of Am. Physicians & Surgeons Brief at 6-8.

That argument erroneously assumes that the Foster family is seeking to assert Mr. Foster's right of privacy. To the contrary, the Foster family asserts its own right as a family against public display of photographs of the dead body of a loved one. The right exists to protect the surviving family against the deeply personal hurt and indignity that would be occasioned, *inter alia*, by the public display of their loved one's corpse in the media or on the Internet. There can be no denying the personal nature of the "shock" Mr. Foster's widow experienced on seeing on television the leaked picture of his dead hand holding the gun, or the personal nature of "nightmares and heart-pounding insomnia" that disclosure caused his sister. JA 91, 93. The mortification and horror the family itself would suffer if additional photographs are "placed on the Internet for world consumption" would be deeply personal. JA 95. Where autopsy photographs had been published on Internet sites devoted to images of violent death, one court found that "the knowledge that these photographs are available to the public for unnecessary perusal caused overwhelming personal

distress and trauma" to the families involved. *Earnhardt v. Volusia County*, No. 2001-30373-CICI, 2001 WL 992068, *3 (Fla. Cir. Ct. July 10, 2001). The public dissemination of such photographs invades the "personal privacy" of the surviving family under any reasonable definition.

All the courts that have considered the matter under the FOIA, including the court below, recognize that the statute protects the privacy rights of surviving family members. *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1173 (9th Cir. 2000), Pet. App. 13a ("the personal privacy in the statutory exemption extends to the memory of the deceased held by those tied closely to the deceased by blood or love"); *Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F.3d at 123 ('[w]hile law enforcement sometimes necessitates the display of such ghoulish materials, there seems nothing unnatural in saying that the interest asserted against it by spouse, parent, and children of the deceased is one of privacy."); *Badhwar v. U.S. Dep't of the Air Force*, 829 F.2d 182, 185-6 (D.C. Cir. 1987) (autopsy reports that "shock the sensibilities of surviving kin" are subject to privacy exemption); *Hale v. U.S. Dep't of Justice*, 973 F.2d at 902 ("personal privacy interests of the victim's family" would be invaded by public release of photographs of murder victim's body); *New York Times Co. v. NASA*, 782 F.Supp. 628, 632 (D.D.C. 1991)(surviving families of Challenger astronauts have a "substantial" privacy interest against public disclosure of tapes of their last moments); *Katz v. Nat'l Archives & Records Admin.*, 862 F.Supp. 476, 483 (D.D.C. 1994)(surviving family has privacy interest in autopsy photographs of President Kennedy), *aff'd on other grounds*, 68 F.3d 1438 (D.C. Cir. 1995).

2. There is, moreover, significant support in the common law for recognition of a family's privacy right in images of the body of a deceased family member. Recently, the Supreme Court of Washington, sitting *en banc*, sustained

a common-law action for breach of privacy against employees of the county coroner's office who showed autopsy and death scene photographs of their loved ones to persons having no legitimate reason to see them, in one case displaying the photographs at cocktail parties. *Reid v. Pierce County*, 961 P.2d 333 (Wash. 1998). *Reid* relied on a Kentucky Supreme Court case that allowed an action against a photographer who displayed photographs of plaintiffs' deceased twin children who had been born joined together. *Douglas v. Stokes*, 149 S.W. 849 (Ky. 1912). That case declared:

> If the defendant had wrongfully taken possession of the nude body of the plaintiff's dead children and exposed it to public view in an effort to make money out of it, it would not be doubted that an injury had been done them to recover for which an action might be maintained. When he wrongfully used the photograph of it, a like wrong was done; the injury differing from that in supposed degree, but not in kind.

149 S.W. at 850.

The *Restatement* recognizes that privacy extends to matters not normally revealed beyond the family or close personal friends, utilizing a version of the Kentucky case as an illustration. *Restatement (Second) of Torts* § 652D cmt. *b* at 386, 387 (illustration 7).[5] The surviving family's privacy

[5] The *Restatement*, in stating that a common law cause of action for breach of privacy "cannot be maintained by other persons such as members of the individual's family, *unless their own privacy is invaded along with his*," *Restatement (Second) of Torts* § 652I cmt. *a* (1977) (emphasis added), recognizes that family members may have their own action for breach of privacy.

right also is supported by cases establishing that survivors have a personal right to control the disposition of the body of a deceased family member. *See* Brief for Respondents Anthony and Moody at 26 n.15. As the Kentucky court observed, "the most tender affections of the human heart cluster about the body of one's dead child," and if the family "may recover for any injury or indignity done the body . . . it would be a reproach to the law if physical injuries might be recovered for, and not those incorporeal injuries which would cause much greater suffering and humiliation." *Douglas v. Stokes*, 149 S.W. at 850.

The offense the Foster family would suffer if photographs of his body appeared on the Internet is similar to that plaintiffs in *Reid v. Pierce County* suffered when photographs of their loved one's body were passed around at cocktail parties by a coroner's office employee. Indeed, instant communications on the Internet plausibly may be viewed as the high-tech equivalent of cocktail party conversations. In both cases, the injury from display of these photographs would be real and personal to the plaintiffs. Exemption 7(C) protects against such a shocking invasion of personal privacy.[6]

3. One amicus brief cites a common-law

[6] One amicus brief argues that Foster's children have not joined in the suit, suggesting that they do not join in the efforts of their mother and aunt to prevent an invasion of family privacy or agree with the findings of suicide. Ass'n of Am. Physicians & Surgeons Brief at 8, 14-15. But the declaration of Foster's widow states that her opposition to release is in accordance with" the wishes of the members of our family." JA 92. *See also* JA 93 (Amended Declaration of Sheila Foster Anthony). The suggestion this amicus brief puts forward is both totally wrong and a grasping at straws in the face of the powerful Amended Declarations of Ms. Anthony and Ms. Moody, which vividly demonstrate the devastating invasions of family privacy that will result if the photographs are released.

decision holding that a father could not bring a common-law privacy action for publication of the details of his daughter's murder. Silha Center Brief at 8-9 (citing *Cordell v. Detective Publications, Inc.*, 419 F.2d 989, 991 (6th Cir. 1969)). However, as this Court stated in *Reporters Committee*, "the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy." 489 U.S. at 762 n.13.[7] Indeed, *Reporters Committee* defined "private" information as information "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." 489 U.S. at 763-64 (quoting Webster's *Third New International Dictionary* 1804 (1976)). Images of the dead body of a family member are normally not intended for anyone outside the family, except in limited circumstances for law enforcement; certainly such images are not expected to be "freely available to the public." There is no common-law tradition in this country of public access to autopsy or death-scene photographs. Petitioner's Brief at 26-27.

There are at least two reasons of no relevance in the FOIA context why a court might be reluctant to recognize a common-law right of privacy against publication of gruesome details of a family member's death. The consequence of recognizing a common-law right is to allow a survivor to sue for damages. In that context, some courts believe that "the danger of spurious claims is too great." *Cordell v. Detective Publications, Inc.*, 419 F.2d 989, 991 (6th Cir. 1969). *See also Smith v. City of Artesia*, 772 P.2d 373, 375 (N.M. 1989), citing "possible misuse" of a damages action and the "traditional reluctance to permit damages that are solely emotional."

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[7] In *Marzen v. U.S. Dep't of Health & Human Serv.*, 825 F.2d 1148, 152 (7th Cir. 1987), the court stated that "the privacy interest protected under the FOIA extends beyond the common law."

In the FOIA context, however, persons asserting a privacy right are not improperly attempting to gain a damages recovery. Unlike plaintiffs in a damages action, the Foster family seeks no profit from its distress; it simply is striving to prevent a further intrusive prolongation of the nightmarish ordeal it has suffered for more than a decade.

In addition, some common-law cases involved publication of the details of a loved one's death that already were a matter of public record. In one case, the defendant had identified plaintiff's daughter as the victim of a rape and murder, on the basis of publicly-available records of a judicial proceeding. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In another case, defendant had published a grisly account of the murder of plaintiff's daughter, where the facts already were a part of the public record. *Cordell v. Detective Publications, Inc.*, 307 F.Supp. 1212, 1218 (E.D. Tenn. 1968), *aff'd*, 419 F.2d 989 (6th Cir. 1969). Allowing a damages action for violation of privacy against an entity that publishes facts already on the public record, this Court has found, would be a violation of the First Amendment. *Cox Broadcasting Corp. v. Cohn*, *supra*.[8]

By contrast, the issue in the present case is not whether the media may publish material already on the public record. The issue is whether death scene photographs should be released to the public. Favish has no First Amendment right to obtain these photographs; any rights he may have are derived exclusively from the FOIA. Application of FOIA Exemption 7(C) to protect the Foster family's privacy raises no constitutional issue. *Houchins v. KQED*, 438 U.S. 1 (1978).

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[8] In *Cox*, the Georgia Supreme Court had found that the father's privacy interest had been invaded, but this Court held that the First Amendment prevented a tort action.

4. Some amici argue that the Foster family's privacy interest is "diminished" because Foster was a significant public official who committed suicide while embroiled in a high-profile political controversy. Reporters Committee Brief at 29, Silha Center Brief at 21 n.11. However, while government officials themselves "may have a somewhat diminished privacy interest," they "do not surrender all rights to personal privacy when they accept a public appointment." *Quinon v. F.B.I.*, 86 F.3d 1222, 1230 (D.C. Cir. 1996) (records involving Chief Judge Tjoflat)(quoting *Bast v. U.S. Dep't of Justice,* 665 F.2d 1251, 1256 (D.C. Cir. 1981). More significantly, the family of a high government official is not required to endure the same privacy intrusions that may be inflicted on the official. *Cf. Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976) (wife of Firestone heir not a "public figure"). After the death of the Governor of Washington, Dixie Lee Ray, her family's right of privacy protected them from the indignity of having her autopsy photographs passed around at cocktail parties. *Reid v. Pierce County*, 961 P.2d at 335.[9] Despite Foster's status as a public official, the Foster family had the right to choose, as it did, a closed-casket funeral. J.A. 91. The indiscriminate circulation on the Internet of photographs of his body would make a mockery of that choice.

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[9] The claims by the Association of American Physicians & Surgeons (Brief at 5) that Mr. Foster had no expectation of privacy because he took his life in a public park ignores the fact that he suffered from a tormenting disease -- depression -- that robbed him of rationality. JA 195-220; *Fiske Report* 21-22, 51. In addition, the issue here involves not his right of privacy, but that possessed by members of his family, which as shown above is separate and apart from the privacy rights he enjoyed. Moreover, the site where Foster shot himself was surrounded by dense foliage and trees, 200 yards from the park's parking area (JA 119-20, 177-78, 195) -- not the kind of area where one might expect a crowd of onlookers and newspaper photographers to arrive before police could cordon off the scene.

One amicus brief attempts to justify the intrusion sought here by arguing that Foster family members already have been subjected to a great deal of probing and publicity about his death. Reporters Committee Brief at 28. But there must be some limit to the intrusions allowed, and that limit surely is exceeded by public display of photographs of their loved one's corpse.[10]

The claims by this same amicus brief that, given the history of this matter, the invasion of privacy caused by release of the photographs would be "minimal" or "muted" (Reporters Committee Brief at 6, 30) are appalling to the family. That brief studiously and callously avoids dealing with the heart-felt declarations of Mr. Foster's wife and sister that establish that the potential privacy invasions would be catastrophic. JA 90, 93. One wonders if those approving this amicus brief would make similar assertions if photographs of their dead, bloodstained loved ones were at issue.[11]

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[10] Favish argues that the photographs could be redacted to eliminate identifying details. Favish Brief at 47-50. But the claimed purpose for release is achieved only if the body is identified. And, of course, everyone would know, including the family, that the body is Mr. Foster's. The family's privacy would still be invaded.

[11] As already discussed, Brief for Respondents Anthony and Moody, 29 n.20, the fact that the photograph of Mr. Foster's hand previously was leaked to the press does not mean that a further release of the more graphic color version of that photograph would not invade the family's privacy. This Court has recognized "the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public." *Reporters Committee*, 489 U.S. at 767. In *U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 380-81 (1976), the Court required redaction of summaries of cadet discipline despite earlier disclosure, because those with earlier access "may have wholly forgotten" the identities of the cadets involved. *See also Bast v. U.S. Dep't of Justice*, 665 F.2d 1251, 1255 (D.C. Cir. 1981) ("[R]enewed publicity brings with it renewed invasion of privacy.").

5. Another amicus brief, while conceding that the two cases involving the photographs at issue "address only the interests of family members in avoiding graphic or emotionally disturbing images of a deceased loved one," expresses concern that a survivor's privacy right "easily could evolve into a generalized 'family privacy' interest," precluding any damaging revelations about the deceased. Silha Center Brief at 20 (citing *Accuracy in Media v. Nat'l Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999); *Favish v. Office of Indep. Counsel*, 217 F.3d 1168 (9th Cir. 2000)). However, as observed in our opening brief, the moments immediately surrounding death are viewed as unique and private by both law and tradition. The case law recognizes that the surviving family has a legal right to dispose of the body of a deceased family member, and long-standing cultural tradition regards the public display of a corpse without family consent as deeply offensive. Brief for Respondents Anthony and Moody at 25-27 and nn.15, 17. There is no comparable legal protection or cultural stricture against criticism of, or damaging revelations about, the deceased, even though such conduct also may cause the surviving family distress. However a family's right of privacy may be limited, it clearly attaches where anguishing moments surrounding death are displayed or recorded.

For this reason, cases extend the family's privacy right to sounds and images of loved ones nearing death. *New York Times Co. v. NASA*, 782 F.Supp. 628 (D.D.C. 1991) (rejecting FOIA request for tape of last moments of the Challenger space shuttle crew); *New York Times Co. v. City of New York Fire Dep't*, 754 N.Y.S.2d 517, 523 (N.Y. Sup. Ct. 2003) (rejecting request under State public information law for transcript and tapes of "calls for help in extremis" from World Trade Center victims). Such a limited application of family's privacy rights presents no danger of the blanket extension of such rights that amicus hypothesizes.

Indeed, the alternative to recognition of such a privacy right is unthinkable. There are Internet sites devoted to the public display of gruesome images of dead bodies, including autopsy photographs. Petitioner's Brief at 30 n.17; Earnhardt Brief at 5-6. To visit those sites is to be repulsed. If there is no privacy right of survivors against such offensive displays, autopsy photographs in the hands of the federal government soon routinely will become the grist of the grisly displays on such sites. It is inconceivable that Congress, in enacting Exemption 7(C)'s protections of "personal" privacy, intended to deny privacy protection to surviving families seeking to avoid the gross indignity and anguish such displays would cause.

II. The FOIA Balancing Required By Exemption 7(C) Is Not Tilted Toward Disclosure

Favish and the some amici argue that, because disclosure is the overriding purpose of FOIA, the privacy exemptions should be construed narrowly to exclude any privacy right of a surviving family. Favish Brief at 4, 8, 47; Silha Center Brief at 1; Reporters Committee Brief at 7-8, 9-10. However, while other FOIA exemptions may be construed narrowly to favor the Act's overall policy of disclosure, Exemption 7(C) is "notable" in requiring a balance that "is not similarly 'tilted emphatically in favor of disclosure.'" *Senate of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d 574, 587 (D.C. Cir. 1987) (R. Ginsburg, J.) (quoting *Bast v. U.S. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)). Indeed, Congress has shown a concern in ensuring the effectiveness of Exemption 7(C)'s protection of privacy by amending it to broaden the scope of its protection. *Reporters Committee*, 489 U.S. 749, 756 (1989). Moreover, the legislative history of the Exemption 6 privacy provision shows that Congress regarded protection of privacy as "equally important" as the broad policy of public disclosure. S. Rep. No. 813, 89th Cong. 1st Sess. 3 (1965), *quoted in U.S.*

Dep't of the Air Force v. Rose, 425 U.S. at 372 n.9. In these circumstances, Exemption 7(C) must be construed to provide the effective protection Congress intended.[12]

To support the argument that Exemption 7(C) should be construed narrowly, two amicus briefs cite *U.S. Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976), *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988) and *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989). Reporters Committee Brief at 7-8; Silha Center Brief at 9-10. But these cases did not involve Exemption 7(C). Moreover, in *John Doe* the Court stated generally that, in construing Exemption 7, it "has endeavored to apply a workable balance between the interests of the public in greater access to information and the needs of the Government to protect certain kinds of information from disclosure. The Court looks to the reasons for exemption from the disclosure requirement in determining whether the Government has properly invoked a particular exemption. . . . In applying Exemption 7, the Court carefully has examined the effect that disclosure would have on the interest the exemption seeks to protect." 493 U.S. at 157.

In *F.B.I. v. Abramson*, 456 U.S. 615 (1982), the Court rejected a "tenable construction" of Exemption 7 adopted by the court below -- a construction that would have required public disclosure of certain documents relating to an FBI investigation -- in favor of an "equally plausible" interpretation that more accurately reflected congressional intent, was more consistent with the structure of the Act, and "more fully preserves the purposes of the statute." *Id.* at

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12 The claim by the Association of American Physicians & Surgeons that Exemption 7(c) is not animated by any public policy (see Brief at 5, 12) is simply wrong. The statutory language, its legislative history, and subsequent interpretations shows clearly that protection of private information the government may hold is the public policy of the United States.

624, 625. Both *John Doe* and *Abramson* are inconsistent with the argument that Exemption 7 must be narrowly construed without regard for Congress' intent to afford meaningful protection to privacy interests.

III. No Legitimate Public Interest Supports Disclosure Of The Photographs

1. One amicus brief asserts generally that there is a public interest in the unnatural death of a high government official involved in a major political controversy and in the conduct of ensuing government investigations. Reporters Committee Brief at 8. But those observations do not automatically establish a public interest in disclosure of the photographs that Favish seeks. Nor does that argument establish that, if such a public interest exists, it outweighs the invasion of privacy that disclosure would entail.

In conducting the balance *Reporters Committee* requires, the Court must consider all relevant factors. These include the fact that there have been five previous investigations of the Foster death, including one by an Independent Counsel who demonstrably had no interest in protecting the Clinton Administration that Mr. Foster served. Pet. App. 26a-29a. Also relevant is the fact that Favish seeks these photographs primarily to establish the type of wound Mr. Foster suffered (Favish Brief at 41-46) -- although photographs revealing this information would be so gruesome and graphic that even the Ninth Circuit was unwilling to require their disclosure. On the other hand, the four photographs that the Court ordered released, according to the Vaughn index and the District Court's description of them, reveal nothing about an exit wound. JA 45a-46a. The Ninth Circuit's determination that release of those four photographs was in the public interest is thus inexplicable.

2. To justify disclosure, Favish and some amici briefs recite a litany of criticisms of the various

investigations into Foster's death. All of these were answered fully by the Fiske and Starr reports.[13] Moreover, aside from the contention regarding the location of the exit wound, Favish and amici do not explain how most of the death scene photographs would have any relevance to various criticisms he raises.[14] Thus Favish discusses whether a car identified in the parking lot of Fort Marcy Park was gray (the color of Foster's car) or brown; who was in attendance at the autopsy; and whether the x-ray machine used at the autopsy was functioning properly. Favish Brief at 28-29, 29-30, 37-40. But Favish fails to explain how death scene photographs of the body would be relevant to the issues he raises about these matters.

Similarly, one amicus brief argues that the photographs should be made public because Foster's fingerprints were not on the gun and there were rug fibers on his clothes. Ass'n of Am. Physicians & Surgeons Brief at 13. But neither Favish nor amici explain how the photographs of Foster's body would show whose fingerprints were on the gun[15] or the origin of the rug fibers found on his

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[13] *See* Petitioner's Brief at 36-37 n.21.

[14] Favish does purport to explain the relevance of the photograph of Foster's hand holding the gun he used to shoot himself. Favish Brief at 40-41. He argues that this photograph might show whether there was blood on the gun, as might be expected in a suicide. But the Starr Report states that traces of Foster's blood were found on the gun, and that there was blood spatter on the fingerprint lift tape used on the weapon. JA 138-40. Moreover, Favish already has a black-and-white copy of that photograph, leaked to the media and published in Time and Newsweek and on ABC Television. Favish does not explain why the color original would show him more, other than to assert (without support) that the published copy is "degraded." Favish Brief at 40. There is no basis for Favish's attempt to manufacture a controversy on this issue.

[15] The Starr Report explains that the handle grip area of the gun was textured and thus not the type of surface that commonly allows identifiable fingerprints. JA 140-41. Moreover, the farfetched nature of Favish's speculations is exemplified by his mystifying contention that, in

clothes.[16] Other assertions by amicus Association intended to disparage the findings of suicide simply are devoid of truth.[17]

Moreover, Favish's lengthy discussion of why he believes the Starr Report is unreliable is based on numerous documents that he obtained from the government -- FBI reports, medical reports, service records of the x-ray machine at the coroner's office, and numerous witness statements. Favish Brief at 18-40. While his critique of the Starr Report falls woefully short, the important point is that he already has received a large number of documents that have enabled him, and the public, to evaluate the report. The FOIA thus has served its function of enabling an independent evaluation of the investigation of Foster's death. There is no showing

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order to obtain a positive (albeit erroneous) identification of the gun that Mr. Foster used to take his life, Independent Counsel Starr "deceptively" showed Lisa Foster the wrong gun. Favish Brief at 23-24. There is no hint why Mr. Starr would do that.

[16] The Starr Report states that, of the 35 carpet fibers found, 23 fibers were consistent with the white carpet in Foster's home; four fibers were consistent with carpets in the White House or Foster's car; while the variety of colors of the non-white fibers "suggests that these fibers did not originate from a single carpet." Accordingly, the carpet fiber evidence "does not support speculation that Mr. Foster was wrapped and moved in a carpet on July 20." J.A. 154-56.

[17] The Association's claim (Brief at 12) that Mr. Foster's behavior before his death was not consistent with suicide overlooks the finding by both Starr and Fiske that Mr. Foster was suffering from depression. JA 195-208; *Fiske Report* 21-22, 51. Moreover, the Starr Report shows Mr. Foster had received medication for depression from a Little Rock, Arkansas doctor and obtained the names of three Washington area psychiatrists from his sister, Ms. Anthony. The Association's claim (Brief at 12-13), unsupported by any evidence or citation, that Mr. Foster's note found several days after his death was a forgery also is refuted by the Starr Report. JA 205-206 n.338 (summarizing handwriting analyses by FBI Laboratory, U.S. Park Police, and an independent handwriting expert).

that the additional disclosure of these photographs would add significantly to the information already made available.

3. One amicus brief argues that unsupported allegations of governmental misconduct should be sufficient to override the Foster family's privacy interest, because otherwise Favish will be denied the very material he needs to prove his allegations. Reporters Committee Brief at 15-18. But unsupported allegations are easy to make. If such allegations were sufficient to overcome privacy interests affected by investigative records, the protection afforded by Exemption 7(C) essentially would be meaningless. Moreover, in a case where a wealth of material already has been released, a requester's failure to adduce significant information from such material demonstrating the need for further, privacy-invading disclosures is particularly telling.[18]

4. One amicus brief argues that the Electronic Freedom of Information Act of 1966 (EFOIA), which established that records in an electronic format are subject to FOIA, overruled the *Reporters Committee* case and established that "any private purpose" could be utilized in an attempt to override a privacy interest implicated by federal investigative records. Reporters Committee Brief at 23-27. (This brief surprisingly fails to cite the sole court of appeals decision which addressed this argument and rejected it. *O'Kane v. United States Customs Serv.*, 169 F.3d 1308 (11th Cir. 1999).[19]) This brief relies on a statement in the "Findings and Purposes" section of EFOIA that the purpose of FOIA was to make certain agency information available to the public "for any public or private purpose." Pub. L. 104-231, § 2(a)(1), 110 Stat. 3048 (1996). But that statement merely reaffirms long-standing FOIA law that any member of the public has a right to non-exempt government records, regardless of his or her purpose. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

Under *Reporters Committee*, a public purpose is required only where privacy interests are implicated and a privacy exemption claimed. The congressional findings in EFOIA acknowledge that rule, stating that the public may obtain access to information for any public or private purpose "subject to statutory exemptions." Pub. L. 104-231, § 2(a)(1), 110 Stat. 3048 (1996). Nothing in EFOIA purports to amend the statutory exemptions, including Exemption 7(C), and nothing in the legislative history demonstrates an intent to cut back on the FOIA's protection of privacy.

Moreover, this case does not present the issue whether a requester's private interest may be considered in determining if release of investigative records invading privacy is warranted. Favish does not claim that his morbid curiosity about Mr. Foster's death constitutes a separate private interest that would outweigh the Foster family's privacy interest. The only interest Favish asserts is the public interest in Mr. Foster's death and the ensuing government investigations. For the reasons previously discussed, that interest is insufficient to outweigh the Foster family's significant privacy interest against public release of the photographs. But if, indeed, the FOIA allowed balancing

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[18] One amicus also argues that the government could hide records by falsely claiming that their release could be reasonably expected to invade personal privacy. Reporters Committee Brief at 21-23. However, the requirement to submit a description of withheld documents, and the availability of in camera inspection in appropriate cases, provide adequate safeguards against that kind of government conduct. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 149 n.2 (1989).

[19] The Reporters Committee appeared as amicus in *O'Kane*. 169 F.3d at 1309.

of a private interest in disclosure against privacy interests against it, Respondent Favish would not prevail. His ghoulish fascination with Mr. Foster's death certainly would not outweigh the family's privacy interest in preventing dissemination of these extremely disturbing photographs by the media and on the Internet.

CONCLUSION

The portion of the judgment of the court of appeals ordering release of four photographs should be reversed.

Respectfully submitted,

James Hamilton
Counsel of Record
Robert V. Zener
Swidler Berlin Shereff Friedman, LLP
Suite 300
3000 K Street, NW
Washington, DC 20007
(202) 424-7500

Counsel for Respondents Sheila Foster Anthony and Lisa Foster Moody

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